

On Monday, November 6, 2000, at 10:15 a.m., upon a motion by **Commissioner Ikerd**, and unanimously carried, the Board agreed to convene in closed session [NCGS 143-318.11(a)(3)] to consult with the attorney to preserve the Attorney-Client privilege.

Present in the Executive Chambers of the 1924 Courthouse were Chair Robert E. Hibbitts, Vice-Chair Marie H. Huffman, and Commissioners Barbara G. Beatty, Katherine W. Barnes and W. Steve Ikerd. Also, present were Staff Attorneys Debra Nass Bechtel, County Attorney Robert Oren Eades, County Manager J. Thomas Lundy, Assistant County Manager Steven D. Wyatt, County Clerk Virginia W. Sobotkin, Public Information Officer C. David Hardin, Utilities and Engineering Public Services Administrator Kevin N. McCracken, Utilities and Engineering County Engineer Douglas G. Chapman, P.E.

LITTLE ROAD WATERLINE

(Background: See Minutes of regular session of February 5, 1996, and September 21, 1998, and closed sessions of February 21, May 1, May 8, May 10, May 16, and August 21, 2000). **The County Attorney** referred to the August 21, 2000, agreements with the Cities of Conover and Hickory to provide water service to southeastern Catawba County.¹ This contractual arrangement would become operative as soon as the Little Road waterline was completed and connected to the County's existing system. The proposed line would involve approximately 10,880 linear feet of twelve-inch water line along Emmanuel Church Road, from McLin Creek south to NC 10, along NC 10 west to Little Road, along Little Road south to Mount Olive Church Road, with meter vault, valves, hydrants and related appurtenances. This line connection from Conover's System at McLin Creek would be constructed by the County under a revenue sharing agreement.

At the September 7, 2000, bid opening the Department of Utilities and Engineering had received favorable bids. The low bidder was \$102,682 less than the next low bidder. Unfortunately, the bids would expire on November 7. The staff had been in contact with Hickory Sand Company, Inc., the low bidder about an extension, but the request had been denied.

The County Attorney discussed various legal issues related to awarding the bid. Prior to awarding the bid, approval of the project's plans and specifications must be approved by the NC Department of Natural and Economic Resources (NCDNER, *Public Water Supply Section, Division of Environmental Health*). The staff had been in touch with NCDNER encouraging it to move forward but had been unsuccessful. NCDNER's position was the County must resolve the "Agreement between Catawba County and Newton for revenue sharing on the Balls Creek Elementary and Bandys High School project dated February 5, 1996, as amended by an addendum to this agreement dated September 21, 1998." Newton refused to provide water service to a number of residential developments already underway or approved in southeastern Catawba County. The matter could not be resolved, and by mutual consent by both parties the contract and addendum with Newton were terminated. NCDNER advised the County that it needed a letter from Newton acknowledging that the Agreement was terminated by mutual consent of both parties. Newton refused to do this.

Newton objected to the agreements with Hickory and Conover because it now did not consider the 1996 agreement and the 1998 addendum terminated. The City wanted to serve a portion of that area beginning at the west side of Balls Creek Road and extending toward the City. This would leave vast portions of southeastern Catawba County unserved by public water and the County unable to obtain water from any other provider. By its inaction NCDNER, in effect, granted the City of Newton an automatic veto over the County's plans to provide water to Catawba County residents.

1

The agreements followed several months of discussion between Conover, Hickory, and the County, after a disagreement developed between the County and the City of Newton over the delivery of Newton water to serve the same area. The Board of Commissioners and Newton Board of Aldermen met on May 10, 2000, in an attempt to work out a solution to the issues, primarily centered on the rates which would be charged and the extension of lines, but no solution could be reached. County officials then began seeking other alternatives for water service in southeastern Catawba County.

Mr. Eades stated he and Attorney H. Glenn Dunn of Poyner and Spruill, LLP, of Raleigh, had discussed the problem. This law firm had been retained in January 2000 to represent the County in the expected litigation regarding the Sherrills Ford/Terrell Wastewater Treatment plant. Mr. Dunn acknowledged this was an unusual situation, one he had never encountered before.

Mr. Dunn cautioned if the County awarded the bids for the Little Road waterline without NCDNER approval it would mean the County was proceeding at its own risk. The County could have civil penalties imposed (up to \$25,000 per day), and in addition, the County could be prohibited from proceeding with construction. If NCDNER considered this action as willful and intentional there was also the potential of criminal penalties. In view of this, Mr. Dunn had suggested the County schedule a meeting in with Raleigh NCDNER officials to present its position, and to consider including representatives from Newton and Hickory. If the informal meeting was not successful, the County could consider seeking a declaratory judgment from NCDNER under the Administrative Procedures Act (APA). This could cause NCDNER to issue the permit or offer its reasons for withholding its ruling. Mr. Eades commented that Mr. Dunn's opinion was NCDNER would eventually approve the project.

Commissioner Ikerd stated his position was to take Newton to court if it was necessary. Commissioners Hibbitts and Huffman stated they would meet with NCDNER, but it was not clear if this would bring any results. In response to Commissioner Ikerd's suggestion of a lawsuit with Newton, Mr. Eades stated the County, if they met with NCDNER, could let them know a lawsuit was pending. He also cautioned that it would take some time to prepare the lawsuit, Newton could appeal, and the project could be delayed for several years.

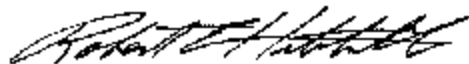
The Commissioners noted Mr. Dunn's suggestions would mean letting the bid expire. They were concerned with losing such a favorable bid with a company that had done good work for the County in the past. Also discussed was the extreme need for municipal water in this area, not only for safe drinking water, but for fire safety. The drought was also causing problems with wells.

Mr. Chapman noted the timetable in awarding the bid, which could be to the County's advantage. He explained that if the bids were approved, the County (owner) must notify the contractor of the bid approval. Afterwards there was a period of 20 days for contract execution--10 days for the owner and 10 days for the contractor. The next move would be for the County to authorize the contractor to proceed with construction. If necessary, the contract could be terminated with or without cause upon seven days' notice. Understandably the County would be required to compensate the contractor for any expenses it accrued pertaining to the project.

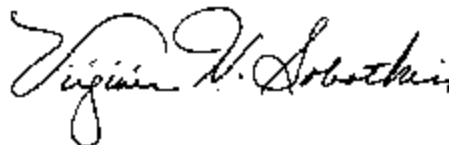
After its deliberation, the Board, upon consideration of the legal ramifications of the various alternatives available to the County, agreed to award the bids for the waterline, would attempt to schedule a meeting with NCDNER, and begin processing a lawsuit against Newton. The Board also directed staff to explain the NCDNER its reasons for awarding the bid prior to obtaining the required approval.

ADJOURNMENT

At 11:03 a.m., the Board returned to regular session and awarded the contract for the Little Road Waterline.



Robert E. Hibbitts, Chair



Virginia W. Sobotkin, Clerk